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In The

Supreme Court of the United States

October Term, 1994

MALLARD BAY DRILLING, INC., AND CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,

Petitioners,

versus

AUBRY AND MARTY WATTERSON,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals, Louisiana Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the decision of the Louisiana Third Circuit and writ denial of the Louisiana State Supreme Court consistent with the Jones Act, 46 U.S.C. § 688 et seq.?

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

This case was brought in Louisiana State Court pursuant to the Jones Act. After trial, final judgment was entered and Watterson appealed to the Louisiana Third Circuit Court of Appeal.

After hearings of both a three-judge panel, and a five-judge panel, the Third Circuit modified the award, and affirmed. *Watterson v. Mallard-Bay et al.*, 649 So.2d 431 (1994). The Louisiana State Supreme Court denied Petitioner's Writ of Certiorari. *Watterson v. Mallard-Bay et al.*, 650 So.2d 241 (1995).

STATUTE INVOLVED

The statute in issue is 46 U.S.C. § 688 et seq. (The Jones Act).

STATEMENT OF FACTS

Aubry Watterson, 27 years old, was employed by Mallard Bay Drilling, Inc. as a floorhand, and a member of the crew of the vessel MALLARD-BAY INLAND BARGE #27. On October 23, 1990, Watterson was working aboard the vessel as a floorhand.

Watterson was instructed by the driller, to "begin chipping and painting in the keyway" two decks below, on a scaffold ten feet above the floor. Watterson and another crewmember reached the area in which they were to work. Watterson noticed water on the scaffold, and went to get rags to absorb the water.

As Watterson attempted to climb down the ladder, the scaffolding shifted, causing the ladder to fall from under Watterson, and Watterson fell 10-12 feet and was injured. Watterson had substantial medical treatment including two separate fusion surgeries at L4-5, and two hospitalizations. It is undisputed that the accident caused the injuries.

REASONS FOR DENYING THE PETITION

The petitioner fails to satisfy criteria traditionally applied by the Court in determining whether to grant a Writ of Certiorari. This case involves no conflict amongst

the Federal Circuit Courts, the decision is in accord with Supreme Court precedent, and presents no conflict of any law. Further the facts in this proceeding are sufficiently unique that their precedential value is likely to be minimal.[1]

The petition for Certiorari fails to cite any Jones Act cases opposing, or even differing from, the conclusion in the case at bar. Rather, it focuses on FELA (railroad) cases that have no applicability to the issue in this Jones Act case.

I. REGULATIONS

Under the Jones Act, a seaman may recover damages from his employer for his employer's negligence. If a violation of "any statute enacted for the safety of employees contributed to the injury or death of such employee," then contributory negligence may not be considered. 45 U.S.C. § 53.

There is no dispute regarding the applicability of 45 U.S.C. § 53 to the plaintiff, a Jones Act seaman. *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S.Ct. 394, 2 L.Ed.2d 382 (1957).

Respondent's expert established, without contradiction, that the Coast Guard, OSHA, and ANSI regulations are all potentially applicable to this uninspected vessel,

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[1] The United States Coast Guard, Merchant Vessel Inspection Department, Washington, D.C., is also developing specific regulations for this industry which, like the FRA, would supplant OSHA authority, thereby mooting the issue in this case.

but, in any case, the regulations are **identical**. The regulations[2] violated require, *inter alia*, that the scaffold be "secured from movement." Petitioner called no expert.

OSHA, *with consent of the Coast Guard*, is the primary regulator of uninspected vessels. *In Re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526 (11th Cir. 1986), *reh'g and reh'g en banc denied*, 790 F.2d 88 (1986) *cert. denied*, 479 U.S. 883, 107 S.Ct. 271, 93 L.Ed.2d 248 (1987).

The court found that "the scaffolding *did move* when Watterson attempted to get down from the scaffolding onto the ladder, and that this was caused by *a failure to properly secure the scaffolding*," which was a "cause in fact" of the plaintiff's injury. Hence, a violation of Coast Guard, OSHA, and ANSI regulations.

Accordingly, the Appellate Courts applied 45 U.S.C. § 53 to bar contributory negligence.

Petitioner bases its entire brief on the same argument that it attempted in front of the Third Circuit. That is, it is

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[2] Specifically, the regulations require that scaffolds more than ten feet off the ground (1) be lashed so as to make one component immobile with respect to the others; (2) be totally enclosed with guardrails; and (3) that the top plate of ladder extend above the scaffold, and be lashed to it. ANSI 4.1, 4.5, 4.5.2, 4.5.9, 4.15, 4.18; OSHA 39 C.F.R. § 1910.28 Safety Requirements for Scaffolds, (a)(1)-(27); ANSI 8.1-8.3.21. The Coast Guard regulations provide that these standards are "incorporated by reference." This incorporation is to save printing space, but this material, like any other properly issued regulation, has the force of law. 5 U.S.C. 552(a); *"Incorporation by Reference,"* October 1, 1990 Martha L. Girard, Director, Office of the *Federal Register.*

not subject to any regulation. The absurd result of petitioner's argument would allow violations of **identical** regulations, despite passage by two separate agencies, OSHA and the Coast Guard.

Petitioner fails to mention that even in its own annual report, introduced at trial, it declares that "[t]he company is also subject to various safety and health regulations as established by the Occupational Safety and Health Administration. (OSHA)."

II. JONES ACT DIFFERS FROM FELA

Petitioner's application fails to separate the distinctions between regulation of the *railroad* industry (FELA) and the *shipping* industry. (Jones Act)

Petitioner's brief only cites cases that involve the application of OSHA to *FELA* claims, not *Jones Act* claims; and it ignores the fact that while the FRA regulates railroads, OSHA regulates uninspected vessels, *with the consent of the Coast Guard.*

Petitioner cannot cite any cases under the *Jones Act* that support its position. It relies solely upon railroad cases. The regulation of the rail industry is materially different from the shipping industry. These FELA cases are not germane to the issue at bar.

The incorporation of FELA principles by the Jones Act is not to be "applied mechanically to the specific facts of maritime events" but rather "interpreted in harmony with the established doctrine of maritime law of which it is an integral part," especially when FELA contains no "definite command" on a given subject. *Cox v. Ruth*, 75

S.Ct. 242, 348 U.S. 207, 99 L.Ed. 260 (1954); *The Arizona v. Anelich*, 298 U.S. 110, 120, 123, 56 S.Ct. 707, 80 L.Ed. 1075 (1936).

A. Petitioner's Argument Falls

Petitioner's argument was properly rejected by the Appellate courts for several reasons.

Petitioner disingenuously argues that two railroad cases, *Reis v. National R.R. Passenger Corp.*, 960 F.2d 1156 (3d Cir. 1992), and *Robertson v. Burlington Northern Railroad Company*, 32 F.3d 408 (9th Cir. 1994), are controlling as to this Jones Act case.

This is simply not true. Although *Reis* and *Robertson* hold OSHA does not provide negligence per se in a *railroad* case, this is not to say that OSHA does not provide negligence per se in a *Jones Act* case.

A proper reading of these cases reveal that, in a railroad setting, the Federal Railroad Administration "FRA," not OSHA, is the primary regulator. The FRA has displaced OSHA regulations in the rail industry. "The FRA has issued a statement indicating which aspects of railroad industry fall under exclusive jurisdiction of the FRA, thereby displacing applicable OSHA regulations." *Velasquez v. Southern Pacific Transportation Company*, 734 F.2d 216 (5th Cir. 1984); *Southern Pac. Trans. Co. v. Usery*, 539 F.2d 386 (5th Cir. 1976), *cert. denied*, 434 U.S. 874, 98 S.Ct. 222, 54 L.Ed.2d 154 (1977).

Even in *Reis, supra*, the court acknowledges that OSHA may provide the basis of negligence per se in

industries other than the rail industry, by affirming this jury instruction:

> Evidence has been introduced in this case on the subject of Occupational Safety and Health Administration (OSHA) standards, ... *These standards are binding on certain industries in the United States. In those industries as to which the standards are binding, a violation of the standards, standing alone, constitutes negligence as a matter of law.* These standards are not binding on defendant Burlington Northern in this lawsuit. *(emphasis supplied).*

If this were a FELA (railroad) case, then it would be the FRA, and not OSHA that forms negligence per se. However, in the inland barge industry OSHA regulations (with Coast Guard consent) are binding, and apply to 45 U.S.C. § 53.

Accordingly, the decision of the courts below is proper in all respects and the writ application should be denied.

B. No Circuit Conflict

Petitioner incorrectly urges that there is a conflict amongst the circuit courts regarding negligence per se in Jones Act cases. Yet petitioner fails to cite any Jones Act cases that are contrary to the holding in this case.

Despite petitioner's claims, courts have found § 653(b)(4) no obstacle to applying the doctrine of negligence per se to OSHA violations. *Dixon v. International Harvester*, 754 F.2d 573 (5th Cir. 1985); *Rabon v. Automatic*

Fastners, 672 F.2d 1231 (5th Cir. 1982); *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981).

These cases distinguish between the use of regulations as a standard of care, and the derivation of a private right of action from the regulations themselves. *Pratico v. Portland Terminal Co.*, 783 F.2d 255 at 264 (1st Cir. 1985). These Federal Circuit cases are exceedingly clear on the point that OSHA may constitute negligence per se in the industries to which they are binding.

In *Rabon, supra*, the court correctly stated:

> Although OSHA creates no private right of action, a violation of an OSHA regulation is evidence of negligence, or in appropriate circumstances, negligence per se. 672 F.2d at 1238. (citations omitted)

This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. Given the unique nature of this case, the remedial nature of the Jones Act, and the identical regulations of the Coast Guard and OSHA, there is no issue or conflict regarding the holding of the lower courts.

Petitioner's writs application should be denied.

III. AWARD OF PRE-JUDGMENT INTEREST IS CORRECT

In a Jones Act suit brought under the court's admiralty jurisdiction the award of prejudgment interest lies within the sound discretion of the trial judge. *Williams v. Reading and Bates Drilling Co.*, 750 F.2d 487 (5th Cir. 1985).

In maritime cases, prejudgment interest is ordinarily awarded from the date of loss. *Reeled Tubing, Inc. v. M/V CHAD G.*, 794 F.2d 1026 (5th Cir. 1986).

The Louisiana Third Circuit found that, like the trial court, "the result is fair and certainly not an abuse of the trial court's discretion." Trial courts are, in Jones Act cases, vested with a great deal of discretion.

Clearly, petitioner has not articulated any compelling reasons to modify this award.

IV. CONCLUSION

Accordingly, for all the foregoing reasons, petitioner's request for a Writ of Certiorari should be denied.

Respectfully submitted,

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